

"Public lottery" means "a lottery to which the public or any class of the public has or may have access, and every lottery shall until the contrary be proved be deemed to be a public lottery."

Section 8A of the Enactment further provides that "A person selling lottery tickets..... shall be presumed until the contrary be proved to be assisting in a public lottery then in progress."

The lottery in question was a sweep, organised by the Penang Turf Club for its Xmas—New Year Gold Cup Meeting, 1933-1934, and the seven tickets were proved to have been sold by the accused.

The issue was: were these sweep tickets "lottery tickets" within the meaning of Section 4 (i) (d) as defined by Section 2 (i) ?

Although every lottery is deemed a public lottery until the contrary is proved, in order to come within the above definition, the tickets must be "connected with any public lottery." It then becomes a question, how is the contrary to be proved? The definition does not directly put on the accused onus of such proof: but, no doubt, this was the intention of the Enactment unless some other proof is given.

A lottery must be either public or not public: i.e., private.

The Enactment, from its title, was clearly aimed at the suppression of "public lotteries," a curious limitation, since in England, under the old Gaming Acts, the expression "public lottery" was only used in connection with lotteries sanctioned by Act of Parliament.

It cannot have been the intention of the Enactment to suppress private lotteries; as if this were so, the word "public" would be redundant.

Mr. S. C. Vickers, the Secretary of the Penang Turf Club, who was called as a witness for the prosecution stated, in cross-examination, that the Penang Turf Club is a private club; this lottery is a private lottery, and the seven tickets were issued as private lottery tickets. His evidence as to this was not rebutted by the prosecution.

These tickets were put in evidence, and the conditions printed on the back support Mr. Vicker's evidence. That the Magistrate took judicial notice of these conditions is proved by his reference to them in his Grounds of Judgment.

The purchaser of the tickets clearly bought them subject to the conditions endorsed thereon, in the same way that the purchaser of a railway ticket is similarly bound by conditions appearing on the back of it; and on the face of these tickets appear the words "Conditions See Back."

This evidence, in my view proved that the sweep (which is admittedly a lottery) was not a public lottery: in other words "the contrary has been proved" (according to the requirements of Sections 2 (i) and 8A of the Enactment) by the evidence for the prosecution. The accused could have called no stronger evidence than that of Mr. Vickers, coupled with the conditions on the back of the tickets.

If the sweep is not a public lottery, and consequently the tickets in it are not "lottery tickets" within the definition, can the nature of the tickets, by being transferred (contrary to the conditions endorsed on the tickets) by members of the Turf Club or others, to members of the public, be changed, so as to become "lottery tickets" within Section 4 (i) (d) ?

Does the fact that, without the knowledge of a member of the Turf Club to whom the ticket was issued, some other person allows the public to "have access to" the lottery, by purchasing tickets in it, change the status of the lottery?

Can a lottery which is proved not to be a public lottery in the Straits Settlements, become one in the Federated Malay States? This is the suggestion made by the Deputy Public Prosecutor, although he has produced no authorities to support the proposition.

The definition of "lottery" in section 2, includes any "game, method, or device whereby money or money's worth in distributed or allotted in any manner depending upon or to be determined by chance or lot, whether the same be held, drawn, exercised or managed within or without the Federated Malay States." This provision is clearly intended to bring within the Enactment lotteries held abroad, e.g., the Irish Hospital Sweepstakes, but it does not alter the status of any lottery held outside the Federated Malay States, nor does it affect the definition of "lottery ticket."

To all these questions, in my opinion, the answer is in the negative; there being nothing in the Enactment to cover these contingencies.

The Enactment is a penal one, and must therefore be construed strictly; and if there is any ambiguity or obscurity the benefit of the doubt must be given in favour of the subject, as against the State.

In my opinion, it was proved that the lottery was not a public lottery. In fact, it was proved to be a *bona fide* private club lottery in the Straits Settlements; and since, to sell a "lottery ticket" is only an offence when the ticket is "connected with any public lottery" the appeal must be allowed and the conviction quashed.

[APPELLATE CRIMINAL JURISDICTION]

MUDIE, J.

June 13, 1934.

LIM KIANG.....Appellant

v.

PUBLIC PROSECUTOR.....Respondent

[NEGRI SEMBILAN MAGISTRATE'S CRIMINAL
APPEAL No. 11 of 1934]

*Common Gaming Houses Enactment, 1912,
Sections 2 and 4 (i) (d)—Public Lottery—Sale
of ticket in a private lottery to the public.*

From the definition of "Public Lottery" in section 2 of the Common Gaming Houses Enactment, 1912 the test of a public lottery is whether the public has access to it or not.

The fact that the organisers intend a lottery to be private is not conclusive, and if the measures they have taken are ineffective to prevent the tickets reaching the public, the lottery is a public one.

It is a question of fact to be decided in each case whether the lottery has been thrown open to the public or not.

Decision in *Chin Tin Chin v. Public Prosecutor*, (1933-1934) F.M.S.L.R. dissented from and not followed.

E. Jeff for the appellant.

Ma'arof bin Haji Zakariah, Deputy Public Prosecutor, for the respondent.

Cur. Ad. Vult.

MUDIE, J.—The appellant was convicted of selling lottery tickets, an offence under section 4 (i) (d) of the Common Gaming Houses Enactment, 1912.

It appears from the definition of "lottery ticket" in section 2 (i) of the Enactment that it only extends to tickets in a public lottery. It follows, therefore, that the offence created by section 4 (i) (d) only extends to such tickets, and has no application to a private lottery.

The prosecution has proved and the appellant does not deny that he was selling tickets issued by the Ch' Hui Toh Club, Penang, in an unlimited cash sweep on the Kuala Lumpur Race Meeting of the 17th March, 1934.

The defence is that the lottery is a private one, and therefore not within the scope of the Enactment.

Lai Hock Chor, who is a member of the Committee of the Ch' Hui Toh Club, Penang, gave evidence to the following effect:—

"This Club runs lotteries on various horse races in Kuala Lumpur and elsewhere. The lotteries are confined to members of the Club only. No member of the public can get a ticket from the Club. Exhibits C, D, and E are tickets issued by the Club on races to be held in Kuala Lumpur. The accused is not a member of the Club. He is a stranger to me. Accused has no authority to sell lottery tickets of my Club. Exhibit A was issued by the Club to a member named Gan Ee."

Though the appellant was selling these tickets to members of the public, it is contended, nevertheless, that the lottery is a private one.

Section 2 of the Common Gaming Houses Enactment, 1912, provides that "public lottery" means "a lottery to which the public or any class of the public has or may have access, and every lottery shall until the contrary be proved be deemed to be a public lottery."

It is contended for the appellant that unless the public can get tickets from the Club it is not a public lottery.

It is said that the position of a member of the public is entirely different from that of a member of the Club, as the Club will not recognise him. Only a member of the Club has any right to the prize money, and the member of the public can only recover it by the favour of a member of the Club.

In my view, however, their position is essentially the same. Neither has any right of action to recover the prize money. Neither in practice has any difficulty in recovering it.

The main argument for the appellant is that where the organisers of a lottery intend it to be a private one, nothing done by an unauthorised person can convert it into a public one. The Club only issues tickets to members. If a member without the authority of the Club disposes of his ticket to some one else, the Club cannot be held responsible. The argument proceeds that if tickets are sold to the public without the authority of the Club, the lottery is not thereby converted into a public one.

This argument has the support of a recent decision of *Howes, J.*, in *Chin Tin Chin v. The Public Prosecutor*, Perak Criminal Appeal No. 16 of 1934, (1933-1934) F.M.S.L.R., a case which is on all fours with the present one. The cashier of a bank sold tickets in a lottery, which was intended by its organisers to be a private one, to members of the public. The learned Judge held that such unauthorised sale of tickets to the public did not change the status of the lottery.

With great respect I am compelled to take a different view. It is clear from the definition that the test of a public lottery is whether the public has access to it or not. In my opinion the fact that the organisers intend it to be a private lottery is not conclusive. They may have taken every reasonable precaution against public access. But if in fact the measures they have taken are ineffective to prevent the tickets reaching the public, the lottery is a public one.

It is urged for the appellant that if this argument is carried to its logical extreme, the sale or gift of a ticket by a member of a Club to a friend who is not a member will convert the lottery into a public one. I do not think that is necessarily so. A member can give tickets to a friend without making them available to all and sundry. It seems to me that whether such action on the part of a member throws the lottery open to the public or not is a question of fact to be decided on the evidence in each case.

The sole test of the nature of the lottery is whether the public has access to it or not. In this case the accused was selling tickets to any one who cared to buy them. In the face of that it seems to me impossible to argue that the lottery is a private one. In my opinion the learned Magistrate was right in holding that this is a public lottery, and in convicting the accused.

The appeal will be dismissed.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

BURTON, J.

May 29, 1934.

SABASTIAN RA'NAM & THANGAVELU....

Appellants

vs.

PUBLIC PROSECUTOR.....Respondent

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL
No. 11 of 1934]

The Criminal Procedure Code, 1926, amended by The Criminal Procedure (Amendment) Enactment, 1928, section 320 — Costs against the Public Prosecutor.